BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BRENDA L. FLINN Claimant	)	
VS.	)	
CESSNA AIRCRAFT CO. Respondent	)	Docket No. 265,783
AND	)	
KEMPER INSURANCE COMPANIES Insurance Carrier	)	

ORDER

Respondent requests review of a preliminary Order entered by Administrative Law Judge John D. Clark on October 9, 2001.

ISSUES

The Administrative Law Judge determined the claimant sustained injury arising out of and in the course of her employment. The respondent appealed and requests review of the issues whether claimant met her burden of proving a compensable injury and whether the claimant is estopped from claiming a work-related injury after certifying, in order to receive short-term disability benefits, that her condition was not related to work.

The claimant contends the Administrative Law Judge's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record compiled to date, the Board makes the following findings of fact and conclusions of law:

The claimant began her employment with respondent in March 1996 as a composite lab technician. Her job involved making aircraft parts and required repetitive bending, lifting, pushing and climbing throughout the workday.

The claimant testified her back pain began to worsen when she began working in the nose section of an airplane which required her to work in a bent over position. The claimant advised her supervisor who told her to only work in the nose section half of the workday.

The claimant testified her back complaints continued to worsen over time. She discussed her back complaints and the fact that work was aggravating her back with all her supervisors as well as personnel in human resources. Claimant further noted she was advised that personnel was looking for a place for her to work that wouldn't hurt her back.

Claimant testified she was advised that because she had not immediately sought treatment at health services, she must have hurt her back somewhere else. She was additionally advised she should have immediately filled out an accident report.

Claimant sought treatment on her own with Dr. David W. Hufford who referred claimant to Dr. Kris Lewonoski. Claimant testified she told all the doctors that she did not have an accident but that work was causing her back pain.

Because of her back condition, Dr. Hufford took claimant off work for 4 or 5 weeks in March 2001. Claimant applied for short-term disability because it was a benefit provided by contract with the respondent.

On the application form for the short-term disability, claimant marked no on the question whether the condition was due to an accident. She also marked no on the question whether the accident happened at work. Claimant stated that she correctly marked the form because she had not had an accident at work. The form additionally questioned whether a workers compensation claim was being made and claimant marked that no.

The claimant filled out the forms after she had advised respondent about her back being aggravated by work activities. The claimant further testified:

> Q. And at the time you filled out these documents, had Cessna provided you with any type of workers' compensation benefits?
>
> A. No.
>
> Q. At the time you filled out these documents was it your understanding that Cessna had denied you workers' compensation benefits?
>
> A. I don't know. I think so, yeah.
>
> Q. And they --

A. Or at least I wasn't getting nothing.

Q. So it would be fair to say, in the very least, at the time you filled out these documents, they had failed to at least provide you any benefits to that point?

A. Yeah, they were not going to give me nothing.[1]

Claimant returned to work for a short period but has been off work since May 8, 2001. On October 3, 2001, Dr. Robert L. Eyster performed surgery which claimant described as two disc fusions.

Pedro A. Murati, M.D., had examined claimant on July 16, 2001. The doctor diagnosed low back pain secondary to symptomatic discogenic disease of the L5-S1 disc and recommended a course of treatment. Dr. Murati related claimant's condition to her work for respondent.

Both Dr. Antonio L. Carro and Dr. Eyster were sent letters which requested an opinion whether claimant's low back symptoms were most probably due to the natural course of her degenerative disc disease or attributable to a work injury. The letter contained a space to mark next to either the response "probable work related injury" or the response "probable degenerative disc disease not related to work injury". Dr. Carro marked his response that claimant's condition was work-related. Conversely, Dr. Eyster marked his response that claimant's condition was not work-related.

Respondent argues the opinion of Dr. Eyster should be adopted. The Board disagrees. Claimant's uncontradicted testimony was that she continually complained of her back condition being aggravated and worsened by her work activities, especially when she began working in the nose section of the plane. It is well established under the Workers Compensation Act in Kansas that, when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident. *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978). The Board concludes that claimant's testimony and the opinions of Drs. Carro and Murati are more persuasive than Dr. Eyster. Accordingly, the Board affirms the Administrative Law Judge's finding that claimant suffered a series of repetitive injuries, which aggravated her degenerative disc condition, while performing her work activities for the respondent.

Respondent next argues claimant should be estopped from claiming a workers compensation injury because in order to obtain short-term disability benefits, claimant filled out forms noting she had not had a work-related accident. Respondent argues it is

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[1] Preliminary Hearing Transcript, October 9, 2001, at 32.

inconsistent to seek short-term disability benefits, claiming there is no work-related accident and then seek workers compensation benefits for the same condition.

Claimant testified she marked the forms indicating that she had not had an accident because there had not been an accident. But claimant did repeatedly tell her employer and the doctors that her work was causing her back pain.

It is not unusual that a lay person, unfamiliar with workers compensation law, would not equate the term accident with repetitive or mini-trauma injuries. Or that a lay person would define an accident as a single traumatic event. Accordingly, under the facts of this case, the Board concludes the manner in which the claimant filled out the short-term disability forms does not equate to an inconsistent position nor estop claimant from seeking workers compensation benefits. When claimant completed the forms she answered truthfully because she did not believe she had suffered an accident at work.

Furthermore, claimant's actions seeking short-term disability followed respondents denial of her attempts to get treatment for her condition. Claimant's uncontroverted testimony was that she was told she could not get treatment for her back condition from respondent. Such denial would lead claimant to believe she had not had an accident at work.

In *Marley v. M. Bruenger & Co. Inc.*, 27 Kan. App.2d 501, 6 P.3d 421, *rev. denied* ___ Kan. ___ (2000) it was noted:

> ' . . . Equitable estoppel is the effect of the voluntary conduct of a person whereby he is precluded, both at law and in equity, from asserting rights against another person relying on such conduct. A party asserting equitable estoppel must show that another party, by its acts, representations, admissions, or silence when it had a duty to speak, induced it to believe certain facts existed. It must also show it rightfully relied and acted upon such belief and would now be prejudiced if the other party were permitted to deny the existence of such facts. . . .' (*United American State Bank & Trust Co. v. Wild West Chrysler Plymouth, Inc.*, 221 Kan. 523, 527, 561 P.2d 792 [1977].)

Applying the foregoing standard to the facts in this case, a stronger argument can be made that respondent should be estopped from using the short-term disability application as evidence against claimant's workers compensation claim. Herein, claimant's uncontradicted testimony was that she was told by respondent her back condition was not work-related. Claimant relied upon those representations and sought treatment with her personal physician and further sought short-term disability when her physician took her off work due to her back condition. Respondent now seeks to deny the claim because claimant relied and acted upon respondent's denial.

Based on the record compiled to date, the Board concludes the claimant's answers to questions on a form completed to request short-term disability, based upon her belief she had not had an accident, are not inconsistent with her later action in seeking workers compensation benefits.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge John D. Clark dated October 9, 2001, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of March 2002.

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BOARD MEMBER

c: Joni J. Franklin, Attorney for Claimant
Eric K. Kuhn, Attorney for Respondent
John D. Clark, Administrative Law Judge
Philip S. Harness, Workers Compensation Director